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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 456

UNITED STATES COLD STORAGE CORPORATION,
Petitioner,

v.

MINUTE MAID CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

The Petitioner, United States Cold Storage Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which reversed, by a divided Court, a judgment of the District Court entered in favor of Defendant-Petitioner.

OPINIONS BELOW

No opinion was rendered by the District Court. The majority and dissenting opinions of the Court of Appeals on the original argument and on re-hearing (reported in *291 Fed. 2d 577*) are attached hereto as Appendix I and Appendix II.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1961. A timely petition for rehearing was denied on July 17, 1961. The jurisdiction of this Court is involved under *28 U. S. C. Sec. 1254(1)*.

STATEMENT AND MATTERS INVOLVED

Petitioner, United States Cold Storage Corporation, is engaged in the operation of cold storage and general merchandise warehouses. Pursuant to a Loan Agreement and in accordance with the general practice in the industry, Petitioner advanced various sums of money to one of its customers, United Foods, Inc. These loans were secured by a lien on merchandise which United Foods stored in Petitioner's warehouse in Texas. As compensation for the loans, in addition to interest, Petitioner was to receive a share of United's profit.

Respondent, Minute Maid Corporation, without knowledge of the relationship between Petitioner and United Foods, sold merchandise, in substantial amounts, to United on credit. When United defaulted, Respondent asserted that

Petitioner was a partner of United and, therefore, responsible for its debts.

The District Court ruled that no partnership existed either on the facts or by operation of law; that the Loan Agreement did not create a partnership and that nothing more than a lender relationship existed. These findings were amply supported by the evidence. Nevertheless, two of the Court of Appeals Judges rejected the findings of the District Court and ruled that there was a partnership by operation of law. This extraordinary result was reached by the majority purporting to apply the law of Texas and also the decision of this Honorable Court in *Meehan v. Valentine, 145 U. S. 611*, which it said was in accordance with the law of Texas. Said Court of Appeals ruling was made despite the fact that the court recognized that claimant "did not know of the relationship" and was not "misled in extending credit" and despite applicable local law which prohibits a corporation from becoming a partner.

QUESTIONS PRESENTED

(a) Did the Court of Appeals render a decision in conflict with applicable state law, and in conflict with settled principles of general commercial law, in holding Petitioner liable as a partner, solely for the benefit of a third party which neither had knowledge of, nor relied upon, the relationship between Petitioner and United Foods?

(b) Did the Court of Appeals, which in attempting to apply the law of Texas relied upon the decision of this Court

in the *Meehan* case said by it to be in accordance with the law of Texas, misconstrue and misapply the decision of this Court?

(c) In view of the settled law of Texas that, in the absence of estoppel, a corporation may not enter into a partnership agreement, did not the Court of Appeals err in holding Petitioner liable as a partner while expressly finding that there was no element of estoppel present?

STATEMENT OF FACTS

This action was commenced by Respondent, Minute Maid Corporation, to recover on an account the sum of approximately $143,000 for merchandise sold to United Foods, Inc. Jurisdiction in the District Court was based upon diversity of citizenship. Respondent at the trial admitted that at the time the goods were sold and delivered to United, it had no knowledge of the relationship between Petitioner and United. Respondent admitted further that no credit was extended nor was the sale made by it on the belief that Petitioner was responsible for United's obligations. Nevertheless, action was brought against Petitioner on the theory that it was generally liable as a partner of United.

On May 1, 1957, Petitioner and Respondent entered into a Loan Agreement. It was amended on June 24, 1957, to increase the amount of the loans United may obtain from Petitioner. The method of operation under the Loan Agreement was as follows: When United stored merchandise in Petitioner's warehouse, it would make application to Petitioner for a loan for a sum less than the market value of the

goods so stored. If the loan was approved by Petitioner, it would lend the money to United on the lot of merchandise stored.

United would then execute and deliver to Petitioner a note in the amount of the loan, payable in one year or on demand after date. Each note provided that the merchandise would be collateral security for the payment thereof, and each note further provided that Petitioner may sell the merchandise posted as security, in the event its value depreciated.

To protect Petitioner's interest in the lot of merchandise which was given as collateral security for the loan, Petitioner arranged for insurance coverage and issued a negotiable warehouse receipt. The insurance certificates and the negotiable warehouse receipt were made out to "United Foods Incorporated, Dallas, Texas, and/or United States Cold Storage Corporation or Order". Similar practice was followed in cases of loans made to other customers. This practice is followed generally by all other warehouses in the United States which make loans to customers against product in their respective warehouses. When the merchandise is withdrawn from the warehouse, the notes evidencing the loans were paid and the transaction completed.

A special account, referred to in the May 1, 1957 agreement, was set up on the books of Petitioner. Quantity discounts, freight allowances and other items were to be paid monthly by United into this account, against which Petitioner charged all warehouse, interest and insurance expenses.

At the end of each calendar year the special account was to be closed, and if there was a credit balance, one-half would be paid to United and the remainder retained by Petitioner. If there was a debit balance in the special account, United would pay one-half of the amount to Petitioner upon twenty days' notice.

All the witnesses, who testified on this point, stated that the amount in the special account was additional compensation for the loans and for United's use of Petitioner's money. All witnesses testified further that there never was any intention on the part of United or Petitioner to form a partnership.

The May 1, 1957 agreement was terminated on December 9, 1957 by a written agreement which provided that all amounts in the special account were to be retained by Petitioner to apply against future storage and financing charges. All amounts in the special account were thereafter absorbed by storage and financing charges and no proceeds out of the special account was due United.

The merchandise which Minute Maid sold to United could have been stored by United in other warehouses. United preferred to store with Petitioner because of the loan agreement. The sales by Minute Maid to United were for United's own account in which Petitioner had no interest and were wholly unrelated to the financing arrangements between Petitioner and United. The majority of the Court of Appeals held, nevertheless, that because of the financing arrangements, Petitioner was responsible for merchandise which United bought for its own account.

The District Court held that Petitioner was not liable to Respondent, finding as facts that:

(a) No credit was extended to United by Respondent upon the belief that Petitioner would pay the account;

(b) Respondent did not claim that there was a "partnership by estoppel" between United and Petitioner;

(c) No control was exercised by Petitioner over the operations of United, except such control as "was the usual concern of a creditor in securing the payment of its debt";

(d) United maintained its own offices and employees, and paid for its own office and selling expenses;

(e) The loans of Petitioner to United were to be repaid regardless of the success or failure of United's operations;

(f) The amounts to be received by Petitioner from the "special account" were for warehouse services, as compensation for the use of Petitioner's money, and as additional security for the loans; and

(g) The relationship between Petitioner and United was that of debtor and creditor, and not of partners or joint venturers.

On appeal by Respondent to the Court of Appeals, the judgment of the District Court was reversed. No new findings were made. A majority of the Court of Appeals, Judge Hutcheson dissenting, held that the loan contract between Petitioner and United created a partnership, so that Petitioner was liable for the debt of United to Respondent.

Judge Hutcheson filed a separate dissenting opinion, stating that there is:

> "in my opinion no basis for any other finding and judgment than the District Judge gave * * *. In support of this view I put forward three positive reasons, not only sustained but required by the record and the law of partnership. The first is that the question of whether or not a partnership is created depends entirely upon the intent of the parties to the agreement to create a partnership. 2. In Texas it is settled law that in order for there to be a partnership the parties must not only patricipate in the profits but they must have an interest in the profits as profits and share them as joint owners or principals of the business or venture, as distinguished from having an interest therein as compensation under a profit sharing agreement. 3. A separate and insuperable ground against finding a partnership in this case is that in Texas corporations may not enter into partnerships."

REASONS FOR GRANTING THE WRIT

I.

The questions presented in this case involve more than ordinary questions of local commercial law. It involves upheaval of the established practice in warehousing operations throughout the nation and it creates a new concept of corporate liability for debts of a third party. If corporations may be held liable for defaults or wrongs of alleged partners (in fact or implied), then director and stockholder control of corporate activity may be shifted to the partner or other agent. Such legal concept is a radical departure from the established principles of corporate law.

Petitioner has been held liable as a partner solely by virtue of having entered into a widely used form of lending agreement in which, in addition to a fixed rate of interest, there is also a sharing of profits as additional compensation for the loan. Such holding, by the majority, is in direct conflict with the generally recognized principles of commercial law and the rule laid down by this Honorable Court in the *Meehan* case.

Petitioner recognizes that only in an unsual and striking case will this Court interfere with a decision as being "in conflict with applicable state law". This is such a case.

The Court of Appeals, in reaching its startling conclusion that this Petitioner, a creditor, is liable to a third party for obligations of its debtor, United Foods, relied on this Court's decision in *Meehan v. Valentine, 145 U. S. 611.* Although the Court of Appeals completely perverted the holding in *Meehan*, the reliance on that case by the Court of Appeals illustrates that the principles involved here are those of general commercial usage, applicable throughout the United States. The misapplication of a landmark decision of this Court will necessarily have profound impact on the law of secured transactions, far beyond the borders of Texas. The effect of the decision will be to upset lending arrangements which are not only in common use but which, in many cases, may be the only available form of credit available to borrowers.

In evaluating the significance of the issues involved, it is important to note that the facts are not in dispute. Petitioner

was held liable as a partner despite three crucial facts: first, Respondent had no knowledge of the lending arrangement, so that it could not have relied upon Petitioner's credit in selling merchandise to United; second, no control was exercised by Petitioner over the operations of United other than the "usual concern of a creditor in securing the payment of its debt"; and third, there was no intention of the parties to create a partnership or joint venture, the participation in profits of United being designed merely to compensate Petitioner for its substantial advances to United.

As stated by the dissenting judge, himself from Texas, the ignoring of these facts by the majority of the Court of Appeals resulted in their being

> "led by a technical definition to apply a certain name and then deduce consequences which have no relation to the grounds on which the name or label 'partnership' could properly be applied".

As discussed in Point II, *infra*, the decision of the Court of Appeals is in utter and irreconcilable conflict with the state law which the Court of Appeals purported to apply. As an important decision in the general field of partnership law, however, the decision below creates a very real danger; a loss of stability in a field of the law where the ability to rely on clearly-defined legal relationships is of vital importance.

This Court has not hesitated in the past to reverse a decision of a Court of Appeals where, as here, there has been a grievous misapplication of state law. See, e.g., *Swafford v. Atlantic Coast Line R.R., 350 U. S. 807, reversing 220 F. 2d*

901 (5th Cir.); City Co. v. Stern, 312 U. S. 666, reversing 110 F. 2d 601 (8th Cir.). Each of those cases involved questions of far less general import than the issues involved in this case. Since in this case there is no dispute over the facts, it is respectfully submitted that the procedure adopted in the *Swafford* and *City Co.* cases be followed: that the writ be granted and the judgment of the District Court reinstated.

II.

A. *Participation in Profits Does Not Constitute a Partnership.*

The majority in the court below purported to follow the principle set forth in *Meehan v. Valentine, 145 U. S. 611,* but the principle of that case was wholly misapplied. In *Meehan,* this Court held that a creditor was *not* liable as a partner although he participated in the profits of the business he financed. The case stands firmly for the proposition that profits may be shared as compensation for a loan without making a recipient a partner. Indeed, this Court in *The J. P. Donaldson, 167 U. S. 599, 605-06,* cited *Meehan* for this proposition:

> "The fact that the sum to be paid to the tug for towing each barge was measured by a certain proportion of the freight to be earned by that barge is immaterial. It did not create a partnership between the owners of the tug and the owners of the barges. Meehan v. Valentine, 145 U. S. 611."

It is equally clear that, in Texas, it is settled law that there cannot be a partnership where the parties merely share

profits as compensation for a loan, at least where there is no exercise of control over the operations of the debtor.

In *Fink v. Brown, 215 S. W. 846 (Tex. Sup. Ct.)*, the suit was for personal injuries, alleging a partnership between the defendants; under a lease between lessor and lessee there was an annual rental and, if the lessee realized more than a certain profit a year, the lessor would be entitled to 50% of the excess. The court held that the mere participation in profits was not a partnership, citing the *Meehan* case, and stated that, in the absence of estoppel or a "holding out", such profit-sharing did not give rise to a partnership.

Similarly, in *United States Truck Lines v. Texaco, 337 S. W. 2d 497 (Tex. Civ. App. Writ refused)*, not cited by the Court of Appeals, one defendant was engaged in developing and operating a mining enterprise. Another party, who was not an operator, furnished one-half of the expenses and was entitled to one-half of the profits. The court decided that persons who are not partners as between themselves cannot be held to be partners as to third persons in the absence of estoppel or holding out, regardless of any mere profit-sharing arrangement they may have. The statement of the Texas Court of Civil Appeals was approved by the Supreme Court of Texas as declaring the correct principles of law of Texas when it refused a Writ of Error on January 11, 1961.

In *Dillard v. Wholesale, 286 S. W. 2d 675 (Tex. Civ. App.)*, not cited below, the court refused to hold as a partner a party who had agreed to loan money and was entitled to

participate in the profits until the repayment of the loan; and in a suit for the payment of a debt said:

> "The rule is stated * * * in Fink v. Brown * * * and is: The participation in profits of itself does not constitute one a partner in a business, but in order to become a partner they must have the right to exercise some character of control over the business."

The District Court's finding in this case, that the only control exercised by petitioner was that which "was the usual concern of a creditor in receiving the payment of its debt," is uncontradicted. Similarly, it is apparent from the Agreement between Petitioner and United that the only power of Petitioner to control the operations of United was that power which any secured creditor must always retain: The power to apply the collateral to the payment of the debt and to refuse to lend additional moneys when requested by the borrower.

B. *Under Texas Law, a Corporation Cannot Become a Partner Except By Estoppel.*

In any event, the decision below is clearly erroneous for the reason that, under general principles of corporate law and under the law of Texas in particular, a corporation may not become a partner except for the benefit of a third party who has relied upon or been misled by the appearance of a partnership relationship. And it is undisputed that Respondent did not even know of the Agreement between Petitioner and United, which the Court of Appeals relied upon as creating the partnership.

There cannot be any doubt about Texas law on this point. In *Port Arthur Trust Company v. Muldrow, 291 S. W. 2d 312 (Tex. Sup. Ct.)*, the court stated that

> "for many years it has been the settled law of this State (Texas) that a corporation may not enter into a partnership for the reason that such action is contrary to public policy."

This statement is a reassertion of a uniform, unbroken line of cases, establishing the applicable Texas law. See, e.g., *Luling Oil & Gas Co. v. Humble Oil Refining Co., 144 Tex. 475, 191 S. W. 2d 716; Sabine Tram Co. v. Bancroft, 16 Div. 170, 40 S. W. 837; Neal v. McElveen, 320 S. W. 2d 36 (Tex. Civ. App.)*. The law of Texas is not unusual in this regard. See, e.g., *Luhrig Collieries Co. v. Interstate Coal & Dock Co., 281 Fed. 265, 274 (S. D. N. Y.)*.

The effect of subjecting a corporation to the obligations of a partnership is to hold that the business of the corporation may be governed by persons other than its board of directors. To hold a corporation liable as a partner is to recognize that corporate debts and obligations may be created by persons wholly unconnected with the corporation. Such a result, of course, may be entirely equitable and proper where the corporation did something to estop itself; it seems inconceivable, however, to reach such a result where a party seeking to hold the corporation liable did not even know of the transaction giving rise to the alleged partnership relationship.

Apparently embarrassed by this point on rehearing, the Court of Appeals refused to consider whether the rule pro-

hibiting corporations from becoming partners was controlling in this case, on the ground that the "point was not alluded to in the original brief and was not presented to the Court in oral argument. It cannot now be raised for the first time by motion for rehearing". Judge Hutcheson, in his dissenting opinion in the *original* decision, found no such barrier to consideration of the point. In any event, the Court of Appeals apparently chose to ignore page 32 of the original Brief for Appellee in the Court of Appeals, where the following language from *Neal v. McElveen, 320 S. W. 2d 36*, was quoted:

> "Moreover, at the time these events occurred it was settled law in this state that a corporation could not enter into a partnership, such action being contrary to public policy." *(Luling v. Humble; Sabine Tram v. Bancroft.)*

Since the point was clearly raised in Petitioner's original brief, it can only be concluded that, on rehearing, the Court of Appeals found it more convenient to ignore this point and leave standing its original decision.

CONCLUSION

The Court of Appeals has rendered an extraordinary decision which is grievously in conflict with applicable state law on a matter of importance not only to Texas but in the field of commercial law generally. Moreover, the refusal of the Court of Appeals to even consider a vital and dispositive point of law constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals (Judge Hutcheson dissenting) has imposed in a business situation a result which, we respectfully submit would never have been anticipated by any business man and which wholly departs from accepted legal principles. The ruling of the Court of Appeals casts a heavy burden on this Petitioner to pay to Respondent, with whom it had no business dealings and which had no knowledge of the relationship between Petitioner and its claimed partner, over $160,000 (principal, interest and costs) on account of the debt of a third party. The ruling is a gross miscarriage of justice.

For these reasons, it is respectfully requested that this Court grant certiorari to review the judgment of the Court of Appeals, and that the judgment below be reversed and that of the District Court reinstaed.

Respectfully submitted,

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By .....
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APPENDIX I

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18697

MINUTE MAID CORPORATION,

Appellant,

versus

UNITED FOODS, INC., *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(May 30, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and BROWN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment of the trial court, sitting without a jury, denying a recovery from United States Cold Storage Corporation by the appellant for the purchase price of commodities sold by it to the United Foods, Inc.

Appellant's theory of recovery was that United Foods, Inc., a direct purchaser from it, was engaged in a partnership operation with the Cold Storage Corporation, thus making Cold Storage liable for the unpaid purchase price.

There is no doubt about the fact that United Foods was indebted to Minute Maid Corporation in the sum of $143,141.66, representing the purchase price of frozen food products sold to United. The question whether Cold Storage is equally liable for this sum must be answered in the light of the following history of the relationship between the parties: Commencing November 1, 1956, United Foods was an authorized direct buyer of products packaged by Minute Mail; Minute Maid's terms of sale for retail size packages to authorized direct buyers, such as United Foods, included discounts based upon the volume of goods included in a single order, which discounts were generally referred to as "quantity allowances" or "freight allowances," or described in the price list as "truckload storage allowances" and "carload storage allowances"; Minute Maid stored a substantial amount of frozen foods in Dallas, Texas, through arrangements with United Foods, paying United Foods at the rate of 20 cents per hundred weight for such storage; at all times pertinent to this action Cold Storage owned and operated a cold storage warehouse in Dallas, Texas.

United Foods did not have the financial ability from its own resources plus normal credit sources to finance the carrying of a large inventory of frozen food products; that means that there were certain substantial price benefits that it could not get; Cold Storage did have and was willing to make

funds available to assist United Foods in buying Minute Maid products in quantities that permitted the maximum discounts; the market conditions affecting frozen food products are such that the price of such goods tends to rise from the month of May to the end of the year, and such increases in price as to citrus food products is as high as 50% in years when weather conditions adversely affect citrus production; at all times pertinent to this action a direct buyer of frozen food products, such as United Foods, was protected against price declines to the extent of inventories representing goods received during the last thirty day period; United Foods, without the knowledge of Minute Maid, operated so as to obtain an additional thirty days protection against price declines by taking goods owned by Minute Maid from warehouses approximately thirty days prior to notifying Minute Maid of the withdrawal. The effect of this relationship made it possible for a direct buyer, by buying large quantities, to profit as much as 50% on inventories by receiving notice from Minute Maid of proposed price increases a considerable time in advance of the price increase, whereas there was practically no risk of a loss on such inventories by reason of the sixty days protection against price declines above referred to. It is undisputed that this made peculiarly attractive the speculation in inventories.

On May 1, 1957, United Foods and Cold Storage entered into an agreement which spelled out their relationship with each other. Since we conclude that the essential question presented by this appeal must be resolved by reference to

this written agreement we consider it essential to print the relevant portions of it in full as follows:

MEMORANDUM OF AGREEMENT

May 1, 1957

Between—United Foods, Inc., referred to as United and United States Cold Storage Corporation, referred to as U. S.

United is a broker of frozen foods in the Dallas, Texas, Area;

U. S. operates cold storage plants at Dallas and Fort Worth, and will extend finance services to United on the following basis:

1. Staple commodities bought by United, stored in U. S. plants, will be the collateral if acceptable to U. S., together with acceptable (to U. S.) accounts receivable resulting from sales of the commodities, for loans to be made by U. S. The aggregate amount of loans outstanding at both plants, taken together, shall not exceed $300,000.00.

2. The amount of loan to United on any lot of product shall be United's gross cost delivered to the warehouse of U. S. The amount of the loan on any of United accounts receivable shall be the amount of the invoices.

3. Notes to U. S. shall be given by United for each loan and shall bear interest at 6% until paid.

4. Notes for loans on commodities shall be paid when product is ordered from warehouse.

5. Notes for loans on accounts receivable shall be paid to U. S. by endorsement of check received from customer to U. S. provided that United will itself pay U. S. for any invoices not otherwise paid in 45 days from date of invoice.

6. Warehouse charges on staple product on which loans are made on these terms shall be 15¢/100 lbs.

handling and 12½¢/100 lbs. per month storage, based on the gross weight of package and contents, and a lot delivery charge of 50¢ as current at each plant. Interest, interest service charges and insurance charges shall be at the rates current at each plant. Tariff rates will apply on all other products stored.

7. All warehouse, interest and insurance charges shall be billed by U. S. monthly, and charged to the "Special Account" described below.

8. The "Special Account" on the books of U. S. is to be set up to accumulate charges as set forth in Paragraph 7 and to accumulate credits as follows:

a. United shall pay to U. S. the 6¢ per dozen packer allowance on retail merchandise or any other quantity allowance, advertising, freight allowance, incentive and profit to the Special Account;

b. United shall pay to U. S. for the Special Account the incentive from any packer special proposals, as for instance, in forward buying, in anticipating of a price raise, or other inducements to move special product items, such as fish, shrimp, poultry and the like;

c. United is paid 20¢/100 lbs./month by Minute Maid on institutional merchandise and this allowance will be paid to U. S. for the Special Account to which also U. S. will debit the warehouse charges on this product;

d. If United shall charge any of its suppliers or customers for storage at a higher rate than U. S. is charging United therefor, the excess shall be paid (upon collection) by United to U. S. for credit to the Special Account.

e. If the amount of any United invoice pledged as an account receivable exceeds the amount of loan on the commodity so invoiced, United shall pay the excess to U. S. for credit to the Special Account.

9. At the end of the calendar year, the Special Account shall be closed, and

a. If there is a credit balance, ½ thereof shall be paid by U. S. to United within 20 days and the remainder shall be retained by U. S. as its property.

b. If there is a debit balance, U. S. shall so notify United, who will pay U. S. ½ of the amount of such debit balance within 20 days of notification.

10. Conditions of pledge of accounts receivable shall be—

a. That the customer billed is acceptable to U. S. as to credit.

b. That United furnishes U. S. two copies of the invoice endorsed with a pledge to U. S. signed by proper officer of United.

c. That United endorse to U. S. the checks received from debtors whose invoices have been pledged.

d. U. S. shall permit a representative of U. S. to inspect United's record of accounts receivable upon request of U. S.

11. In case of pending price increase, U. S. and United may agree on the volume to be purchased by United, and U. S. will loan, upon receipt of product in storage, the cost to United. When the price increase is effective, U. S. will loan United an additional amount equivalent to the price increase, and such amount shall be paid by United to U. S. for credit to the Special Account, as set forth in Paragraph 8 b.

12. This agreement shall terminate January 1, 1958, but may be extended by written agreement of the parties hereto.

On June 24, 1957, the foregoing agreement was amended only to the extent of providing that instead of $300,000 the

aggregate amount of loans outstanding was increased to $500,000.

All of the sales for which the purchase price is here in litigation were made while this contract was in effect. Subsequently, on December 9, 1957, at which time there was a credit balance of approximately $22,000 in the "special account," referred to in the contract, the parties entered into a termination agreement terminating the contract effective December 31, 1957. This contract further provides:

> "Any amounts due by United States Cold Storage Corporation to United Foods, Inc. under said contract and the provisions of paragraph nine thereof shall be retained by United States Cold Storage Corporation to apply against future storage and financing charges that may accrue on products stored with them by United Foods, Inc."

United Foods, as a food broker engaged in the business of selling Minute Maid products, and during the year 1957 handled in excess of $1,000,000 of these products. This business was carried on by United Foods at its own office, with its own employees, and at its own expense.

During the life of the contract, Cold Storage did advance 100% of the invoice price of Minute Maid products purchased and stored by United Foods in Cold Storage's warehouse; and United Foods deposited in the "special account" all of the allowances referred to in the written contract. This account, which was held by Cold Storage, paid Cold Storage interest at 6% on all advances and paid its warehouse and insurance charges monthly. At the end of the year the profits

from the accumulated credits exceeded these expenses by some $22,000.

Minute Maid did not know of the relationship between United Foods and Cold Storage. It does not contend that it was misled into extending credit to Minute Maid by reason of such relationship. It contends that the agreement between the parties and the course of dealing thereunder created a partnership relationship between Minute Maid and Cold Storage and that Cold Storage became liable with United Foods for all debts of the partnership. Minute Maid distinguishes between the regular sales business of United Foods, in selling Minute Maid products to the trade from what it considers to be the subject of the partnership. It says that the partnership consisted of a joint endeavor by United Foods and Cold Storage under which United Foods would take advantage of its position as a direct purchaser of Minute Maid products and of the financing afforded it by Cold Storage to buy products in the quantities that would yield the greatest amount in allowances and discounts and if the market appeared right, to speculate on a possible price increase; that in return for Cold Storage's agreement to finance the transaction to the extent of advancing 100% of the purchase price of the products it would store the products in Cold Storage's warehouse at a profitable rate, it would pay interest of 6% on all advances and it and Cold Storage would share equally in the profits that could thus be anticipated from the discounts and from profitable speculation, if indulged in.

Cold Storage, on the other hand, contends that the agreement created only a relationship at most of debtor and

creditor between it and United, or that the relationship was an ambiguous one which the trial court, on disputed evidence, found as a fact not to be a partnership.

The essential facts are not in dispute. A decision, therefore, whether the relationship shown by the undisputed facts to exist, constituted a partnership or only that of debtor and creditor is one for the court to make as a matter of law. We thus approach the question not as a reviewer of the facts, but to determine whether the trial court properly applied the law to the facts.

A critical examination of the foregoing facts, most of which are made the basis of formal findings by the trial court, necessarily leads to the following conclusions:

(1) Cold Storage was to be repaid the principal amount of its advances to United regardless of the success or failure of the enterprise.

(2) Cold Storage was to receive its warehouse charges, its interest at 6% and reimbursement for the cost of insurance out of the "special fund" set up under the contract. It seems plain that there could be no failure of the special fund to provide sufficient sums to meet these obligations and provide a profit, because the parties could in advance know exactly how much by way of special allowances and discounts would be paid into the special fund, and, of course, the charges would bear a direct relation to these same items. However, if there was a deficit in this special fund, it was to be shared by the parties equally.

(3) The advance of 100% of the invoice price of the merchandise was not a normal credit arrangement which would be available to United by the payment of legal rates of interest.

(4) Both United and Cold Storage would profit by increasing the purchases of United made possible by the arrangement between the two parties. United's profit would come from its 50% participation in the profits in the special fund and Cold Storage's profit would come from the increasing of the inventory for which it received substantial warehouse fees, an increase in inventories for which it received its 6% interest and the anticipated profit arising by reason of the fact that it could be computed in advance that the special allowances and discounts paid into the fund would exceed the carrying charges. Cold Storage became the owner of one-half of this excess.

(5) Cold Storage was undoubtedly in the relation of a creditor of United; it was also in the relation of a bailee for hire.

(6) It is also clear, however, that the operation that here produced the sale of the volume of Minute Maid products to United would not have occurred by reason of Cold Storage's willingness to engage in either or both of these two activities standing alone, and on normal terms—that is as a creditor receiving a legal rate of interest and a warehouseman receiving its stated warehouse charges.

(7) It is plain that Cold Storage was interested in assisting United to create a larger indebtedness on which it would

receive its interest and a larger volume of inventory on which it would receive its warehouseman's fees and that in order to assist in creating this larger volume of business for itself it participated with United in making possible the larger purchases of Minute Maid products than United could otherwise have accomplished.

Does this analysis cause us to conclude that the two parties, acting to their mutual interest to make possible an increased purchase of Minute Maid products, created a joint venture or partnership between them?

Basically the parties do not disagree as to what constitutes a partnership under the law of Texas. Appellant points to the case of *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554, in which the Texas Supreme Court said:

> "There is no substantial difference between the rule in Texas and that announced in Meehan v. Valentine, 145 U. S. 623, 12 S. Ct. 975, 36 L. Ed 835, in these words:
>
> > " 'In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all, that each is agent for the firm and for the other partners, that each receives part of the profits as profits and takes part of the fund to which the creditors of the partnership have a right to look for payment of their debts, that all

> are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business, and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive evidence of partnership'."

Although the appellee does not undertake to set out in express terms its understanding of what the Texas law is on the creation of a partnership in abstract terms, preferring rather to seek to point out the absence of certain criteria, which it contends are essential to a finding of a partnership, it clearly implies its agreement with the definition set out above. It does so by itself, relying upon *Meehan v. Valentine*, 144 U. S. 611, referred to in the Thompson case, *supra*, and *Fink v. Brown*, 215 S. W. 846, which gives substantially the same definition, and by its own statement in brief that "there must be evidence 'of a joining between appellant and [United] in a common business to be operated for their joint account in which each as owner had an interest which would entitle them to share as principals in the profits'." This statement by appellee is, of course, a paraphrase of the definition taken from the Meehan case.

We take it, therefore, to be the law of Texas that if the parties entered into a contract from which it is clear that the parties contemplated joining in a common business for their common benefit to be operated for their joint account and in which they as owners each of an interest would be entitled to share as principals in the profits as such, they would be partners. See *Fink v. Brown*, 215 S. W. 846 (Commission of

Appeals), cited both by appellant and appellee as defining the relationship.

Appellee is too preoccupied, we think, with its insistence that the relationship between United and Cold storage was that of debtor and creditor. This is undoubtedly correct, but it is equally undoubtedly indecisive. Appellee also relies strongly on the contention that there was no express obligation assumed under the written contract whereby Cold Storage was to share in the overall losses of the enterprise. This, of course, is the very question that this Court has to decide, for if the relationship between the parties constituted them partners, then the law imposes upon them the obligation to pay the losses. No case has been cited from Texas or elsewhere to the effect that the mere failure to agree in the formal contract that the parties will share the losses prevents the relationship from being that of partners. To the contrary, Thompson and Schmitt, *supra*, expressly stands for the proposition that "even an express stipulation between them that one should not be so liable, though good between themselves, is ineffectual as against third persons." (quoting *Meehan v. Valentine*, 145 U. S. 623.)

It is the burden of appellee's argument here that if there is nothing more than a lender relationship, coupled with an agreement that compensation for the loan is to be in the form of a sharing in profits, either in lieu of or in addition to normal interest, these facts are sufficient to rebut the presumption that arises by the profit sharing agreement. Appellee contends that additional indicia of an intent to create a partnership must be shown either in the nature of a joint

control by the person sought to be bound as a partner, or an express agreement to share in losses.

Assuming this position to be correct, we think it is undeniably true here that control over the particular enterprise in which these two parties were engaged was jointly held by United and Cold Storage. We must bear in mind exactly what this enterprise was. It was not the commission food business carried on by United. It was the arrangement whereby Cold Storage furnished the financing and warehouse facilities to make possible United's use of its relationship as a direct buyer of Minute Mail products in such quantities and under such terms as would turn a profit for both of them. There can be no question but that the parties had joint control over the enterprise. This follows from the fact that United initially determined how much to buy but such determination was subject to Cold Storage's right to determine whether the proposed collateral would be "acceptable." Also, it was provided that in case of pending price increases, which the court found would offer the opportunity to speculate on inventory, the parties would agree on the volume to be purchased. In point of fact the responsible officer for United testified that, "they [Cold Storage] could have stepped in and written me [United] off pretty damned fast."

Appellee argues that the retention of warehouse receipts by Cold Storage in its name as joint depositor and the assignment of invoices to it for its protection were normal security measures taken by the lender on a warehouse stock. This, it seems to us, misses the whole point. Whether or not such security measures amounted by themselves to "control"

of the partnership affairs, we think the operation heretofore outlined was clearly within the joint control of the parties.

Finally, appellee urges that this Court should find that the Texas law has changed and that there should no longer be a distinction between what constitutes a partnership as between the parties themselves on the one hand, and as to third parties on the other. In effect appellee is urging that we should find that the uniform partnership act, heretofore adopted in several states, is now the law of Texas, notwithstanding the refusal of the Legislature of that state to adopt it. Such an argument, of course, has no place in a discussion of what the law is under the Texas decisions.

We conclude that the relationship established by the written contract of the parties and by their conduct thereunder constituted a legal partnership or joint enterprise under the Texas law.

Appellant alleges error in the failure of the final judgment below to include interest from the date of the sworn account. It points out that the trial court, in its conclusions, found appellant was entitled to interest against United from January 1, 1958, whereas the final judgment allows interest only from the date of judgment. Appellee makes no response to this contention. We conclude, therefore, that the judgment against United should be in accordance with the trial court's conclusion above referred to.

Appellant argues here that under a stipulation between the parties it is now entitled to a separate hearing as to an attorney's fees to be recovered from appellee. There is nothing

in the judgment touching on this matter, and there is, therefore, nothing to appeal from. If such stipulation is in effect between the parties, it is a matter to be brought upon remand to the attention of the trial court.

The judgment of the trial court is, REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion.

HUTCHESON, Circuit Judge, Dissenting:

As I read the opinion of the majority, I have no quarrel with its statement of the facts of this case. I think, though, its conclusion that there was a partnership between United States Cold Storage Corporation and United Foods, Inc. and that the district judge, in holding and adjudging the contrary, was wrong, is a complete non sequitur. It seems indisputable to me under the facts as found by the district judge, indeed under the undisputed facts, that there is no basis for finding a partnership, and, therefore, for setting aside and reversing the judgment of the district court.

Read the facts as set out in the district court's findings and in the majority opinion as one will, there is, in my opinion, no basis for any other finding and judgment than that the district judge gave. In short, this is just another "partnership" label case in which the question of partnership vel non is debated in artificial terms, with the result that the debater, here the majority, is led by a technical definition to apply a certain name and then to deduce consequences which have no relation to the grounds on which the name or label

"partnership" could properly be applied. *Batman v. Commissioner*, 189 F(2) 107. Cf. *Guy v. Donald*, 203 U.S. 399.

In support of this view, I put forward three positive reasons, not only sustained but required, by the record and the law of partnership.

The first is that the question of whether or not a partnership is created depends entirely upon the intent, of the parties to the agreement, to create a partnership, 32 Tex. Jur., "Partnership", Sec. 13, 233; *Luling Oil & Gas v. Humble*, 144 Texas, 475, 191 SW(2) 716. Cf. *U.S. Truck Lines v. Texaco, Inc.*, 337 SW(2) 497; not, however, their secret subjective intent but the intent manifested in what they agreed to, and did, do. Here there was no such indication whatever of such an intent on the part of either United States Cold Storage or United Foods, Inc.

Second, in Texas it is settled law that "In order for there to be a partnership, the parties must not only participate in the profits but *they must have an interest in the profits, as profits, and share them as joint owners or principals of the business or venture, as distinguished from having an interest therein as compensation under a profit sharing agreement.*" (emphasis added). *LeBus v. LeBus*, 269 SW(2) 506. Here there was no agreement between United States Cold Storage and United Foods, Inc., that they should go into any kind of business together to share the profit thereof. The agreement was specifically that the United States Cold Storage, in connection with its warehousing business would lend money to United Foods and the money loaned would be paid

back to United States Cold Storage at all events, primarily out of the special account provided for in the agreement, if there was accumulated enough in it to pay it, with the further understanding, however, that there was a chance that after the loan, with interest, was paid back by United Foods, there would be additional compensation to United States Cold Storage out of one-half of the special account, if there was a balance left in it after paying the proper expenses chargeable against it.

Third, a separate and insuperable ground against finding a partnership in this case is that, in Texas, corporations may not enter into partnerships, 32 Tex. Jur., "Partnership", Sec. 25, and, while there have been cases where a corporation has been held estopped to plead ultra vires, under the general principle disqualifying corporations from being partners, the finding and conclusion, that they intended to be, and took some action which made them, partners, would be legally inconceivable since it would find an intent to do something forbidden by, and contrary to, law, and there are no facts whatever to support such a finding.

But over and above these three insurmountable obstacles, there is the added one that, except in a case of estoppel or a holding out, a court should not strain, through a finding of partnership, to hold a person, who did not contract a debt, liable for it.

In my opinion the findings and conclusions of the district judge, a long time Texas lawyer of wide business and legal experience, correctly set out the facts and the legal principles

governing here, and I concur fully in his findings and conclusions. I therefore, dissent from the contrary conclusions of the majority opinion, that there was a partnership.

I respectfully DISSENT.

A true copy

TEST: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug 3 1961

APPENDIX II

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,697

MINUTE MAID CORPORATION,

Appellant,

versus

UNITED FOODS, INC., *et al.*,

Appellees.

Appeal from the United States Court for the Northern District of Texas.

(July 17, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and BROWN, Circuit Judges.

PER CURIAM: The motion for rehearing points out that, after this case was argued and submitted to the Court, to-wit, on May 16, 1961, the Legislature of the State of Texas enacted the Uniform Partnership Act, contrary to the statement contained in our opinion dated May 30, 1961.

The section mentioned in the Uniform Partnership Act did not in any way enter into our consideration of this case on the merits. We concluded that the undisputed dealings and relationship between the parties created the relationship of partners under applicable Texas decisions. Nevertheless, in the interest of accuracy, we strike the following paragraph from the opinion:

> "Finally, appellee urges that this Court should find that the Texas law has changed and that there should no longer be a distinction between what constitutes a partnership as between the parties themselves on the one hand, and as to third parties on the other. In effect appellee is urging that we should find that the uniform partnership act, heretofore adopted in several states, is now the law of Texas, notwithstanding the refusal of the Legislature of that state to adopt it. Such an argument, of course, has no place in a discussion of what the law is under the Texas decisions."

Appellees now, for the first time on appeal, contend that corporations cannot legally stand as partners in relation to each other in Texas. This point was not alluded to in the original brief and was not presented to the Court in oral argument. It cannot now be raised for the first time by motion for rehearing.

The motion for rehearing is DENIED.

HUTCHESON, Circuit Judge: I dissent.

A true copy
TEST: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug 3 1961

PROOF OF SERVICE

The undersigned, Counsel for Petitioner U. S. Cold Storage Corporation herein, certifies that on this date he deposited in the United States mail at Dallas, Texas, with first-class postage prepaid addressed to William C. Garrett, Counsel for Respondent Minute Maid Corporation, 2400 Adolphus Tower, Dallas 2, Texas, a copy of the foregoing Petition for Certiorari; and on the same date deposited in the United States mail at Dallas, Texas, with air mail postage prepaid addressed to C. E. Gober, 8th Floor, Fulton Federal Building, Atlanta, Georgia, Counsel for United Foods, Inc., a copy of the foregoing Petition for Certiorari.

Dated this ... day of ....., 1961.

.....

HUBARD TAYLOR BOWYER
Counsel for Petitioner,
U. S. Cold Storage Corporation.